NO. 22024

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE JOHN MINASIAN,

Appellant,

vs.

CAPT. PAUL R. ENGLE,

Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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OPENING STATEMENT

Appellee contends, in effect, that the District Court had no jurisdiction in this matter because:

1. Appellant as a voluntary enlistee on active duty was not in such "custody" as to make the Writ of Habeas Corpus applicable (Resp. Brief, pp. 11-14). 1/

1/ In conformity with the system of parenthetical references used in Appellee's Opening Brief and Appellee's Brief, the following abreviations will be used:

Matter in the Transcript of Record: Tr. 1, p. ___;
Matter in the Reporter's Transcript: Tr. II, p. ___;
Matter found in exhibits admitted into evidence as:
Petitioner's Exhibit I (Department of Defense

(Continued)

2. A federal district court does not possess the authority to review procedures followed by the Navy in handling requests for discharge on the grounds of conscientious objection (Resp. Brief, pp. 12-14).

It is further argued by appellee:

1. That appellant's letter of January 24, 1967, with attachments and incorporated matter did not constitute a new request for discharge (Resp. Brief, pp. 14-17).

2. That the following of applicable regulations by the Chief of Naval Personnel in processing appellant's request for discharge dated September 18, 1965, satisfies the procedural requirements as to the letter of January 24, 1967 (Resp. Brief, pp. 17-19).

3. That the voluntary enlistment of appellant in 1961, and other actions on the part of appellant, all prior to September 18, 1965, constitute a basis in fact for finding that the appellant should be classified as a non-combatant on January 24, 1967 (Resp. Brief, pp. 20-21).

1/ Continued:
Directive 1300.6(1962): Pet. I, p. ___;
Petitioner's Exhibit II (Part C-5210, Bureau of Naval Personnel Manual): Pet. II, p. ___;
Petitioner's Exhibit III (letter from Chief of Naval Personnel to appellant's counsel, dated March 23, 1967): Pet. III, p. ___;
Respondent's Exhibit A (Certified Military Record relative to appellant's request for discharge): Resp. A, p. ___;
Parenthetical references to Appellant's Opening Brief: Brief, p. ___; and
Parenthetical references to Appellee's Brief: Resp. Brief, p. ___.

Finally, appellee contends that the failure of appellant to file a "Traverse" to appellee's Answer and Return alleging that no new relevant matter was added by the letters of appellant after September 18, 1965, requires a finding to that effect here (Resp. Brief, p. 16).

Appellant proposes to deal first with the technical effect, if any, of his failure to file a "Traverse", then to consider the question of jurisdiction, and to conclude with a comment on the other points raised by appellee.

I

THE MATERIAL ALLEGATIONS OF THE ANSWER AND RETURN ARE TRAVERSED (OR DENIED) BY THE PETITION.

Appellee suggests that appellant was bound by some rule or principle of law to file a document entitled "Traverse to the Answer and Return" (Resp. Brief, p. 16). Title 28 U.S.C. §2248 does not purport to require such a document, but does require that material allegations of the Answer and Return, where not denied by the Petitioner, or by a Traverse, where the Petition lacks an effective contravening allegation, "shall be accepted as true except to the extent that the judge finds from the evidence that they are not true."

Vitale v. Hunter, 206 F. 2d 826 (10th Cir. 1953), cited by appellee (Resp. Brief, p. 17), does not support his position. In relevant part, that decision reads as follows:

"Under the common law, as adopted by statute, 'The

allegations of a return to the writ of habeas corpus or of an answer to an order to show cause in a habeas corpus proceeding, if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true.' 28 U.S.C.A. §2248. No evidence is necessary to support the allegations of a return. It imports verity and must be taken as true, unless directly put in issue by the pleadings. Crowley v. Christensen, 137 U.S. 86, 11 S.Ct. 13, 34 L.Ed. 620; United States ex rel. D'Istria v. Day, C.C., 20 F.2d 302; Graham v. Carr, 9 Cir., 112 F.2d 908; United States ex rel. Catalano v. Shaughnessy, 2 Cir., 197 F.2d 65. An issue joined by the petition and the return must be determined upon proof. See Stewart v. Overholser, 87 U.S.App.D.C. 402, 186 F.2d 339. But here, the allegations with reference to the entry in 1944 stand untraversed and unrebutted, and we think they must be taken as true." (Emphasis added)

The petition herein alleges:

"g. On January 24, 1967, petitioner submitted his third request for discharge by reason of conscientious objection pursuant to the provisions of Bureau of Naval Personnel Manual Article C-5210. Said request reasserted by reference the matters

set forth in his previous requests for discharge and supplemented the same with additional documentary evidence; said documentary evidence included letters from two chaplains assigned to petitioner's unit, both confirming the belief in petitioner's sincerity and recommending his discharge as a conscientious objector." (Tr. I, pp. 2-3)

Appellee argues:

"In the sworn-to Answer and Return on file herein (Tr. I, pp. 14-19), appellee alleges that appellant's requests of February 2, 1966 (Tr. I, p. 15), and January 24, 1967 (Tr. I, p. 16), were requests for reconsideration of appellant's previous request for discharge of September 18, 1965, and by such requests for reconsideration, no new relevant matter was added to said initial request." (Resp. Brief, p. 16)

Obviously the allegations of the Answer and Return are traversed (denied) by the Petition. The issue as to the nature of the letter of January 24, 1967 as a new request for discharge, or as a mere request for reconsideration of a previous request for discharge, was squarely before the trial court.

Appellant contends that the trial court erred in its resolution of that issue.

II

THE DISTRICT COURT HAD JURISDICTION TO GRANT THE WRIT OF HABEAS CORPUS.

A. APPELLANT IS IN "CUSTODY" WITHIN THE MEANING OF 28 U.S.C. §2241.

The statute under which appellant asserts federal jurisdiction is 28 U.S.C. §2241, the pertinent portion of which prohibits the granting of the writ unless a "prisoner" is "in custody in violation of the Constitution or laws or treaties of the United States."

Is a member of the Naval Reserve, on either active or inactive status, "in custody?"

Initially, it should be noted that the Court of Appeals for the Third Circuit in its decision in Brown v. McNamara, #16454 (November 24, 1967), which was appended to Appellee's Brief as Appendix "A", made the following disclaimer:

> "The lower court denied any relief by way of habeas corpus, finding no constitutional infirmity in the administrative procedure used by the Army and no jurisdiction to review their factual determination under that procedure. We agree with the excellent opinion of Judge Lane on the issue of procedural due process. [3]
>
> "3 Brown v. McNamara, supra. We use the dichotomy of 'procedural' and 'substantive' due process in this case only to help emphasize what we do and do not decide on this appeal. We realize fully that the distinction is not always a clear line and may well break down under certain circumstances.

"Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life. We therefore affirm the conclusion 'that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation.' See Brown v. McNamara, supra, at 691.

"Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction. E. g., Harmon v. Brucker, 355 U.S. 579, 581-2 (1958)." (Emphasis added) (Resp. Brief, pp. A-4 to A-5)

The significance of that disclaimer is accentuated by the fact that Brown was himself an enlistee and that the case came before the Third Circuit by way of appeal from the denial by the District Court of a petition for writ of habeas corpus -- an exact procedural parallel to the instant case.

The court in Brown found that the petitioner's request for discharge was handled in "full compliance of the Army with AR 635-20" (Resp. Brief, p. A-7); the Army regulations cited are similar to the regulations applicable here in carrying out the

directives of the Department of Defense (DOD 1300.6; Pet. I). Thus the Brown decision deals with a situation similar in some respects to that of appellant but clearly distinguishable as to the manner in which the appropriate authority (here Chief of Naval Personnel) handled the pertinent request for discharge.

Habeas Corpus has long been used as a means of testing the legality of induction into the military service. See United States v. Anderson, 24 Fed. Cas. 813 (No. 14,449) (C.C.D. Tenn. 1812). Or, as the court said in Estep v. United States, 327 U.S. 114, 124, 90 L.Ed. 567, 574 (1945): " . . . It has been assumed that habeas corpus is available . . . after a registrant has been inducted into the armed services. . . ."

The trial court in United States ex rel Orloff v. Willoughby, 104 F. Supp. 14 (W.D. Wash., 1952), affirmed 195 F.2d 209, affirmed 345 U.S. 83, 97 L.Ed. 842, denied habeas corpus to a doctor, after induction into the Army, who contended that his custody was unlawful because he was not being used in a medical category. The court held that habeas corpus was a proper procedure, but that the Federal District Court was without power to require the Army to grant a commission to the petitioner, since the controlling statute did not require that doctors be used in a medical category. In reviewing that opinion, this Honorable Court did not contravene Judge Lindberg's statement that " . . . the Petitioner here is clearly within his rights in coming into Court seeking a writ of habeas corpus to determine his status," but asserted: "[t]he fundamental question before us is one of statutory construction." 195

F. 2d at p. 210.

Appellant respectfully submits that the law on this point was accurately and concisely stated by Judge Weinberger in In Re Phillips, 167 F. Supp. 139 (S. D. Calif. 1958) at p. 141:

> "The Court is of the opinion that the petitioner is 'in custody' within the requirements of Section 2241 of Title 28 U. S. C. A. and that the application for writ of habeas corpus is a proper remedy to test the legality of his detention in the Marine Corps. United States ex rel. Orloff v. Willoughby, D. C., 104 F. Supp. 14, affirmed 9 Cir., 195 F. 2d 209, affirmed 345 U. S. 83, 73 S. Ct. 534, 97 L. Ed. 842."

Noyd v. McNamara, 378 F. 2d 538 (10th Cir. 1967), is not to the contrary, since it turned upon a failure of the petitioner to exhaust administrative remedies.

Appellant is thus "in custody" within the meaning of 28 U. S. C. §2241, as a member of the Naval Reserve, whether he be on active duty, or on inactive status but subject to momentary recall to active duty.

B. FEDERAL DISTRICT COURTS DO HAVE JURISDICTION TO REVIEW PROCEDURES FOLLOWED BY THE NAVY IN HANDLING REQUESTS FOR DISCHARGE.

In his Opening Brief appellant quoted from Brown v. McNamara, 263 F. Supp. 686 (D. C. N. J. 1967) in support of his contention that the District Court had jurisdiction to review the

ruling of the Chief of Naval Personnel in this matter. More recently, the Court of Appeals for the Third Circuit has clearly expressed itself as in agreement with appellant's contention:

> "We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record. [4]
>
> 4 Such concerns as interference with the military are not irrelevant or necessarily of slight importance. See Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 197 (1962)." (Emphasis added)
> (Resp. Brief, pp. A-4 - A-5)

In Harmon v. Brucker, 355 U.S. 579, 2 L. Ed. 2d 503, petitioners, having been discharged from the Army with other than honorable discharges, sought declaratory relief and a writ of mandate directing the Secretary of the Army to issue to them honorable discharges. The District Court denied the relief sought, and the United States Court of Appeals for the District of Columbia affirmed. The Supreme Court took the view that the Federal District Court had jurisdiction to review the propriety of the action of

the Secretary of the Army:

> "Generally, judicial relief is available to one who has been injured by an act *[355 US 582] *of a government official which is in excess of his express or implied powers. American School of Magnetic Healing v. McAnnulty, 187 US 94, 108, 47 L. ed 90, 96, 23 S Ct 33; Philadelphia Co. v. Stimson, 223 US 605, 621, 622, 56 L ed 570, 577, 578, 32 S Ct 340; Stark v. Wickard, 321 US 288, 310, 88 L ed 733, 748, 64 S Ct 559. The District Court had not only jurisdiction to determine its jurisdiction but also power to construe the statutes involved to determine whether the respondent did exceed his powers. If he did so, his actions would not constitute exercises of his administrative discretion, and, in such circumstances as those before us, judicial relief from this illegality would be available. Moreover, the claims presented in these cases may be entertained by the District Court because petitioners have alleged judicially cognizable injuries. Cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 US 123, 159, 160, 95 L ed 817, 847, 848."

In May, 1967, the Supreme Court cited Harmon v. Brucker in support of the proposition "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the intent of Congress." Abbott Laboratories v. Gardner, 387 U.S. 140, 18 L. ed. 2d 681.

Clearly, Federal District Courts do have jurisdiction to review procedures followed by the Navy in handling requests for discharge which are authorized under existing Navy regulations.

III

THE FAILURE OF THE NAVY TO PROCESS APPELLANT'S LETTER OF JANUARY 24, 1967, IN ACCORDANCE WITH REGULATIONS RENDERS HIS CONTINUED CUSTODY UNLAWFUL.

A. THE CHANGE IN THE DEPTH OF APPELLANT'S CONVICTIONS IS A CHANGE IN STATUS BY BOTH SELECTIVE SERVICE AND NAVY STANDARDS.

Appellee argues that, by appellant's request for discharge of January 24, 1967, "not a single substantial factor is added to his requests of September 19, 1965 and February 2, 1966." (Resp. Brief, p. 15). That assertion overlooks the distinction between the evaluation of appellant's position by his chaplain in September, 1965:

> "In view of the above, I must affirm my very serious question as to the sincerity of his declared position, and cannot, in conscience, recommend that he be granted the status of 'conscientious objector'. I feel that his earlier desire for 'non-combatant' status is reliable as it is borne out in the fact that he was striking for a hospital corpsman rating." (Resp. A, p. 34)

and the evaluations by his chaplains in January, 1967:

Chaplain Bigler (Resp. A, p. 43):

"I am convinced of his sincerety and have reviewed the logical process with him which requires he take this stand."

"I strongly recommend that MINASIAN'S request for discharge as a conscientious objector be granted for the good of the man and the Naval Service."

Chaplain Six (Resp. A, p. 44):

"It is my opinion MINASIAN is sincere and devoted to his personal convictions concerning military service. His position is now marked by an unwillingness to serve even as a non-combatant."

The fluid nature of personal convictions was discussed at length by the Court of Appeals for the Second Circuit in United States v. Gearey, 368 F. 2d 144 (1966), cert. denied 36 Law Week 3204, rehearing denied 36 Law Week 3242, where a registrant under the Selective Service system filed his application for classification as a conscientious objector (SSS Form No. 150) after he had received an order to report for induction. The Selective Service Board, pursuant to a regulation (32 C. F. R. §1625. 2), refused to reopen his classification, and Gearey was convicted for refusal to submit to induction. The Court of Appeals reversed the conviction and remanded for further proceedings.

"The considerations are quite different, however, when a claim of conscientious objection, raised for the first time after receipt of an induction notice, is based on a claim which had not previously matured. Section 6(j)

does not set any time limit by which an applicant's conscientious objections must fully crystalize in his mind. It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until after he received his notice, [10] although the belatedness of a claim may be a factor in assessing its genuineness. See Clancy & Weiss, 'The Conscientious Objector Exemption,' 17 Maine L. Rev. 143, 147 (1965); Note, 'Pre-Induction Availability of the Right to Claim Conscientious Objector Exemption,' 72 Yale L. J. 1459, 1462 (1963). The realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments. The long history of exempting conscientious objectors, coupled with the specific statutory right of appeal, indicate to us a strong Congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferments in appropriate cases. Implementation of that policy requires that any individual who raises his conscientious objector claim promptly after it matures - even if this occurs after an induction notice is sent but before actual induction - be entitled to have his application considered by the Local Board. [11] In light of this, the Local Board must first determine when an applicant's

beliefs matured. If the Board properly concludes that the claim existed before the notice was sent, the classification may not be reopened. [12] If the Board finds, however, that the applicant's beliefs ripened only after he received his notice, and that his beliefs qualify him for classification as a conscientious objector then a change in status would have occurred 'resulting from circumstances over which the registrant had no control,' and he would be entitled to be reclassified by the Local Board. [13]

"10. The Defense Department has recognized that a genuine claim of conscientious objection may arise even after induction. The various military services have therefore provided procedures for investigating such claims, and in appropriate cases for granting discharges. See Department of Defense Directive No. 1300.6, ASD(M) (Aug. 21, 1962); Army Regulation No. 635-20 (Nov. 9, 1962); Department of the Navy, Bupers Instruction 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Regulation No. 35-24 (March 8, 1963).

"11. Any other conclusion would result in the anomalous situation that individuals whose claims of conscientious objection mature either prior to receipt of a notice of induction or after induction itself, would be permitted to apply for deferment, while those whose beliefs formed during the interim period, would not be able to properly raise their claims. It would appear this is so because Department of Defense Directive No. 1300.6 states:

> Federal courts have held that a claim to exemption from military service under the UMT&S Act must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. Therefore, request for discharge after entering military service, based solely on conscientious objection which existed but was not claimed prior to induction or enlistment, cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied

by Selective Service prior to induction cannot be entertained.

"12. This result is dictated not only by §1625.2, but in most cases by §1625.1(b) as well. 'Each classified registrant and person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification * * *.' 32 C.F.R. § 1625.1(6). See Keene v. United States, supra, 266 F.2d at 384. In United States v. Corliss, 280 F.2d 808, 812, cert. denied, 364 U.S. 884, 81 S.Ct. 167, 5 L.Ed.2d 105 (1960), we inferentially approved the application of that section to conscientious objector claims.

"13. See Keene v. United States, 266 F.2d 378, 384 (1959). But see United States v. Taylor, 351 F.2d 228 (6 Cir. 1965); Boyd v. United States, 269 F.2d 607 (9 Cir. 1959); United States v. Schoebel, 201 F.2d 31 (7 Cir. 1953)."

United States v. Gearey, 368 F.2d 144 at 150.

The evidence presented here points unequivocally to the conclusion that appellant's beliefs "matured" during his period of active duty: in September, 1965, he was a conscientious objector to combatant service; in January, 1967, he became a conscientious objector to both combatant and non-combatant military service. A change in status cognizable under both Selective Service and Navy standards, thereby occurred.

B. THE LETTER OF JANUARY 24, 1967, MUST BE TREATED AS A NEW REQUEST FOR DISCHARGE.

Appellant concurs in the comment made by the trial judge: "Surely the Navy Department should not be put to the fully detailed process, as a new request, of every letter a petitioner files arguing error in the decision

of the Chief of Naval Personnel, as to a prior request for discharge." (Tr. I, p. 77)

But where the new request establishes a "maturing" of a conscientious conviction, the new request is different in kind from a mere request for reconsideration of a previous request for discharge. Under such circumstances both the applicable regulations and the principles of due process require that the new request be processed "in a manner which provides equal protection of laws" (to quote Judge Lane in Brown v. McNamara, supra, 263 F. Supp. at p. 691) to all who present their views promptly as such views mature.

CONCLUSION

For the reasons stated, the Order appealed from should be reversed, and the Writ of Habeas Corpus should be granted.

Respectfully submitted,

RICHARD W. PETHERBRIDGE

Attorney for Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Richard W. Petherbridge
RICHARD W. PETHERBRIDGE